Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | MB Docket 04-261 |
| Violent Television Programming | ) | |
| And Its Impact on Children | ) | |

TO: The Commission

**COMMENTS OF THE MEDIA INSTITUTE**

The Media Institute, a non-profit research foundation specializing in communications policy and First Amendment issues, was formed 25 years ago to foster three goals: freedom of speech, a competitive media and excellence in journalism. We comment in this proceeding because the expanded scope of content regulation discussed in the Notice of Inquiry here threatens each of these three core values. Attempting to regulate "violence" in the media would abridge the First Amendment rights of television broadcasters to provide, and the First Amendment rights of American viewers to receive, information free from government interference. It would produce asymmetric regulation of competing media outlets and undermine the competitiveness of the broadcast industry. And it would chill protected speech and impede the free exercise of journalistic discretion. We urge the Commission in the strongest possible terms to report to Congress that it does not have authority to regulate "violence" in programming and that an expansion of its mandate to regulate "violence" is neither justified under the current state of the evidence nor permissible under the First Amendment.

### *1. Regulation of "violent" programming would require constitutional line-drawing that would lead to impermissible self-censorship.*

Content regulation by a government agency, particularly one subject to political and popular influence, is a constitutionally dangerous enterprise. This is particularly true in an area where content regulation would be based on vague concepts such as "violence."

Achieving a working definition of "violence" is far more complex than defining indecency, which itself is a difficult task. Ill-defined qualifiers such as "excessive" or "gratuitous" do little to provide a working definition that broadcasters can use to make programming decisions day in and day out. It is even more problematic that the alleged harmful nature of violence on television is closely tied to context. All "violence" is not equal. Consider the context of physical force seen in a football game, a Road Runner cartoon, the Academy Award-winning Vietnam war documentary *Hearts and Minds,* the Holocaust drama *Schindler's List*, a scene of domestic abuse in *The Burning Bed,* an acclaimed film on violence against women, a broadcast of The Three Stooges, an airing of the evening news with discussion of crime, and a science fiction film such as *Star Wars*. Instances of violence, essential to each of these protected forms of speech, serve a completely different function in each instance based on context. Establishing a definition that can capture the nuanced role depictions of violence seen in dramas, comedies, and educational features while allowing for predictability in enforcement would be an impossible task.

Regulation in a state of ambiguity creates a Hobson's choice for the broadcaster. In deciding whether to broadcast a program that may be criticized by regulators with the power to fine or even raise a license renewal issue, the broadcaster is

forced to weigh the risk of a fine or, more significantly, the threat of endangering a license upon renewal against the exercise of its First Amendment right to broadcast constitutionally protected content. With these disincentives present, the broadcaster faced with the task of complying with a nebulous standard for content regulation may well engage in self-censorship of non-objectionable and constitutionally protected material to avoid the risk of punishment. The end result would be an unjustified and unwarranted restriction of artistic creation and journalistic freedom.

***2. The state of research does not provide a constitutionally sufficient basis to restrain speech protected by the First Amendment.*** Regulation of "violence" necessarily requires a content-based determination by the government. Even speech criticized as "violent" is, of course, subject to the full protection of the First Amendment.[1] Content-based restrictions on expression must be narrowly tailored to promote a compelling government purpose. The "least restrictive means" necessary to promote that interest must be employed or the regulation will be constitutionally invalid.[2]

In the case of regulation of "violent" speech, the necessary predicate for regulation – that the regulation would, in fact, promote a compelling governmental interest by protecting children from suffering the untoward effects of exposure to "violent" programming – cannot be established on the basis of the inconclusive scientific research. As one recent meta-study concluded, more than half of studies on the effects of exposure to "violent" media found no positive correlation.[3] The Federal Trade

---

1 *See Winters v. New York,* 333 U.S. 507, 510 (1948); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

2 *See United States v. Playboy Entertainment Group,* 529 U.S. 803 (2000).

3 Jonathan Freedman, *Media Violence and Its Effects on Aggression* 56, 62–63 (2002).

Commission recently reviewed the body of scientific research in the area and found that most researchers agree that "exposure to media violence alone does not cause a child to commit a violent act" and that media violence "is not the sole, or even the most important, factor in contributing to youth aggression, anti-social attitudes, and violence."[4] To be sure, proponents of increased regulation can point to contrary conclusions and interpretations of the body of research.[5] But courts have rightly found that the inconclusive state of the research on this central question, despite three decades of scientific investigation, is too slim a reed on which to base a speech-restrictive regime.[6] The same result should be found here.

***3. Because a filtering solution is broadly available to parents, there is no justification for a system of content regulation to protect children from "violent" media.*** In *Ashcroft v. American Civil Liberties Union,*[7] the Supreme Court in June 2004 struck down the Child Online Protection Act on grounds, among others, that the widespread availability of Internet filtering software permits parents, rather than the government, to control the content accessed by their children. Because a non-governmental means existed to accomplish the goals of the statute without censorship, government limitations on speech could not constitute the "least restrictive means" of

---

4 Federal Trade Commission, *Marketing Violent Entertainment to Children: A Review of the Self-Regulation and Industry Practices in the Motion Picture, Music Recording and Electronic Game Industries,* Appendix A (2000).

5 In one high-profile statement almost contemporaneous with the FTC study, for example, the American Medical Association and other groups issued a joint statement asserting that "viewing entertainment violence can lead to increases in aggressive attitudes, values and behavior, particularly in children." *Joint Statement on the Impact of Entertainment Violence on Children,* July 26, 2000.

6 *See, e.g., Video Software Dealers Ass'n v. Maleng,* 325 F. Supp.2d 1180 (D. Wash. 2004).

7 124 S. Ct. 2783 (June 29, 2004).

accomplishing the governmental goal. Or, as put more eloquently by Clare Booth Luce, "censorship, like charity, should begin at home, but unlike charity, it should end there."

The Commission appropriately inquires about the potential of the "V-Chip" and the self-regulatory system under which the television industry provides ratings to programming, to empower parents to limit their children's exposure to "violent" programming. Cable and satellite subscribers, moreover, increasingly have additional means to control the content to which children may gain access. In our view, these private-sector efforts to empower parents make it unlikely that a separate effort to regulate "violent" speech could be upheld.

As the Commission notes, issues have been raised about the efficacy of the ratings system on which the V-Chip is based, and continued experience with the relatively new system for ratings will lead to greater predictability over time. Additional self-regulatory technological measures may also become available – and the low-tech alternative of relying on parents' own responsibility to police their children's behavior also must be considered in this vein as well. In light of the current availability of non-censorship mechanisms to filter television programming for children, an additional regulatory scheme would be inappropriate, unnecessary and constitutionally suspect.

***4. Restricting "violent" speech on broadcast television alone would be irrational, but applying "violence" regulation to cable and satellite television would be plainly unconstitutional.*** Even if one accepts that exposure to violence is harmful to children or society in a meaningful way, restricting broadcasters' right to choose the programming they wish to display in no way alleviates any perceived harms. Put bluntly, it is naïve to believe that restricting the availability of "violent" programming on one

medium alone – broadcast television – will have a significant effect on the amount of exposure to "violent" content. Because some 85 percent of American households subscribe to cable and satellite — media for which restrictions of violent content will undoubtedly violate the First Amendment — any attempt to limit the purported effects of exposure to violence will cut off only a portion of children's access to such material (not to mention the availability of material on the Internet, on videotape or DVD, in theatrical film, and in print and other media).

In order for the government to justify a content restriction based on content, it must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[8] It is difficult to see how this requirement could be met by heavy content regulation of a single medium in the context of the vibrant and varied mix of media available in the typical American household. Here, consistency and constitutionality are at odds – an attempt to apply a consistent regime to broadcast television, cable and satellite television, pay services, future video delivery over DSL and Internet protocol television would fail because those media, unlike broadcast, have a more realistic standard of First Amendment protection than the courts have so far accorded to television broadcasting.

***5. The Commission lacks authority under the Constitution and the Communications Act to engage in a pervasive program of content regulation of "violence."*** The Commission is strictly constrained by the First Amendment and Section 326 of the Communications Act from censoring the speech of the media it regulates, and

---

[8] *Edenfield v. Fane*, 507 U.S. 761, 770–771 (1993).

its ability to expand its authority is strictly circumscribed by the courts.[9] As Chairman Powell said yesterday, albeit in a different context, "don't look to us to block the airing of a program."[10] Yet, the Commission's recent history in penalizing so-called "indecent" speech provides a compelling example of the dangers of government content regulation. As The Media Institute and others have pointed out, the "no tolerance" approach adopted by the Commission in recent indecency cases has led to significant self-censorship by the broadcast industry and has chilled speech and "block[ed] the airing" of programs.[11] Live coverage of news and sporting events has become riskier for broadcasters, and in light of recent cases even affiliate clearance of network programming may require pre-screening to avoid potential liability.[12] A decade ago, Judge Wald noted that "[e]ven a cursory glance at the Commission's enforcement policy to date . . . suggests that the chill is quite substantial."[13] The evidence today is far more dramatic.

---

9 *See Motion Picture Ass'n of America v. Federal Communications Comm'n,* 309 F.3d 796 (D.C. Cir. 2002).

10 Communications Daily, Friday, October 15, 2004, at 11 (commenting on the Commission's authority to interfere with Sinclair Broadcasting's decision to broadcast a documentary critical of Senator John Kerry).

11 *See, e.g.,* Petition for Reconsideration of the American Civil Liberties Union *et al.*, File No. EB-03-1H-0110 (April 19, 2004); Comments of Public Broadcasters on Petitions for Reconsideration, File No. EB-03-1H-0110 (May 5, 2004); Comments of NBC Television Affiliates in Support of Petition for Partial Reconsideration of the National Broadcasting Company, Inc., File No. EB-03-1H-0110 (May 5, 2004); Comments of CBS Television Network Affiliate Association in Support of Petition for Partial Reconsideration of the National Broadcasting Company, Inc., File No. EB-03-1H-0110 (May 5, 2004);

12 *See Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married by America,"* File No. EB-03-1H-0162 (October 12, 2004).

13 *Action for Children's Television v. FCC*, 58 F.3d 654, 685 and n.1 (D.C. Cir. 1995) (Wald, J., dissenting).

The same advocacy groups that have agitated for more aggressive penalties for "indecent" programming already have called for the Commission to expand its mandate dramatically under the cover of this Inquiry. Morality in Media, for example, has urged the Commission to expand its existing "indecency" definition to encompass "Indecent speech is language that, in context, describes or depicts either (1) sexual or excretory activities or organs or (2) outrageously offensive or outrageously disgusting violence or (3) severed or mutilated human bodies or body parts, in terms patently offensive as measured by contemporary community standards for the broadcast medium."[14] And its proposed definition of "violence" would be "intense, rough or injurious use of physical force or treatment either recklessly or with an apparent intent to harm."[15] It is self-evident that the media could not report the news, broadcast dramatic works appropriate for adults or even air professional sporting events under such a regime. But this proposal does serve to demonstrate the pressures that would be brought to bear on the Commission to take a hard line against a form of constitutionally protected content that cannot be defined with sufficient precision to permit government regulation and penalty.

---

[14] Comments of Morality in Media 3, MB Docket 04-261, September 15, 2004.

[15] *Id.* at 3. It is difficult to imagine how broadcasting football, hockey or most other contact sports would be permissible under this view.

*  *  *

There is little question that violence in society is a major public policy issue in the United States. At the same time, there can also be little question that the causes and consequences of violence are extraordinarily multifaceted and complex. Attempting to ameliorate this daunting and difficult societal problem by imposing yet another regime of content regulation on a single medium – broadcast television – is as unwise as it is unworkable. We urge the Commission to report to Congress that the pragmatic and constitutional impediments that stand in the path of creating a regime for regulating "violent" programming counsel against further legislative or administrative attention to this proposal.

Respectfully submitted,

/s/ Kurt Wimmer
Kurt Wimmer
Andrew D. Sherman

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000
(202) 662-6291

*Counsel to The Media Institute*

Patrick D. Maines, President
Richard T. Kaplar, Vice President

THE MEDIA INSTITUTE
1800 North Kent Street, Suite 1130
Arlington, Virginia 22209
(703) 243-5060

October 15, 2004